IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

RSA.No. 408 of 2007()

AS.87/2003 of ADDL. DISTRICT COURT-II, KOZHIKODE
OS.347/1998 of PRL.M.C.,KOZHIKODE-II

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APPELLANT /APPELLANT/ PLAINTIFF

PUTHANPURAYIL AHAMMED,S/O.SAIDUTY,
PUTHANPURAYIL HOUSE,
VAVAD AMSOM,KALARANTHIRI DESAM,
KOZHIKODE TALUK.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS:RESPONDENT/ DEFENDANT

1. PUTHANPURAYIL KUNHEEMA UMMA,
D/O.IMBICHIMOYI,KUNNATHKULANGARA,
VAVAD AMSOM,KALARANTHIRI DESAM,
KOZHIKODE TALUK.

2. KOLASSERRI MOOTHEDATH SUBAIDA,
D/O.ANTHRUMANKUTTY,VAVAD AMSOM,
KALARANTHIRI DESAM,KOZHIKODE TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 20/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S. NO. 408 OF 2007

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Dated this the 20th day of August, 2007

JUDGMENT

First plaintiff in O.S.347/1998 on the file of Munsiff Court, Kozhikode is the appellant. Defendant is the first respondent and second plaintiff second respondent. Appellant with second respondent instituted the suit seeking a decree for specific performance of Ext.A1 agreement for sale contending that under Ext.A1 agreement respondent agreed to sell plaint schedule property for a total consideration of Rs.40,000/- and Rs.30,000/- was paid as advance and the balance was remained to be paid and they are always ready and willing to perform their part of the contract and therefore they are entitled to get a decree for specific performance of Ext.A1. First respondent filed a written statement denying the execution of Ext.A1 agreement and contending that there was no agreement at all and she did not

receive any amount. Before the trial court, on the side of the plaintiffs, PW1 was examined and on the side of first respondent she was examined as DW1 and Exts.A1 to A6 and Exts.B1 to B3, Ext.C1 was marked. CW2 was also examined. Learned Munsiff on the evidence found that appellants did not establish that Ext.A1 agreement was executed by respondent and dismissed the suit. Appellants challenged the decree and judgment before District Court, Kozhikode. Learned Additional District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

2. Learned counsel appearing for appellant was heard.

3. The argument of learned counsel appearing for appellant was that courts below having found that defence of respondent that she used to affix her thumb impression alone and not the signature is not correct, should have upheld the case of the plaintiffs that Ext.A1 agreement was executed

by the respondent. It was argued that though appellants have taken steps to examine one of the attesting witnesses to Ext.A1 and warrant was issued he could not be examined and appellants have done all what could be done on their part and in the circumstances, courts below should have granted the decree.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Execution of Ext.A1 agreement was disputed at the outset. In such circumstance, burden is heavily on the plaintiffs to establish that it was executed by first respondent. Ext.A1, as seen from the document was attested by two witnesses. Even if the case of the appellant that he had taken steps to examine one of the attesting witnesses and he could not be examined as he did not appear before the court is true, there is no reason for non-examination of the second witness. The allegation that he was siding with the respondent by itself is not a ground to justify his

non-examination. On appreciation of the evidence courts below found that execution of Ext.A1 was not proved. The fact case of respondent with regard to the practice of affixing thumb impression is found to be not correct, is not a ground to uphold the case of execution of Ext.A1 when better evidence could have been adduced by appellant. In any event, the factual findings of courts below cannot be said to be perverse warranting reappreciation of evidence and substitution of the findings of this court to that of the courts below in exercise of the powers of this court under section 100 of C.P.C.

As no substantial question of law is involved in the appeal, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006